IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO._____

MONROE J. STEWART,
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS

The District Court for the Middle District of Alabama wrote no opinion, but the opinion of the Circuit Court of Appeals for the Fifth Circuit written by Judge Holmes, was filed on December 5, 1942, and appears at page_____ of the Record. This was reported in_____ F. (2d)_____.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (U. S. C. A. Title 28, Section 347). The judgment of the Circuit Court of Appeals was rendered December 5, 1942. Petition for rehearing was denied January 16, 1943. This petition was filed February 15, 1943.

SUMMARY OF FACTS

The facts are stated in the petition at page 3.

The indictment charged a conspiracy to violate the unrelated statutes of the Internal Revenue Laws, and misprision of felony. Demurrer raising the proposition that this did not sufficiently inform the defendant of the charge against him was overruled.

During the trial the Assistant District Attorney stated as a fact that it would be to the defendant's interest to make all possible cases against those who were not paying off and the more cases they made the more people they could get to pay off, and in general was guilty of highly improper conduct throughout the entire trial. The court below permitted any hearsay testimony which the prosecution sought to admit, so long as it was as to a statement by an alleged co-conspirator.

ARGUMENT

I

Throughout the entire trial the District Attorney and his assistant were guilty of conduct which this Court has characterized as highly improper.

> *Williams v. United States,* 168 U. S. 382, 42 L. ed. 509;
> *Berger v. United States,* 295 U. S. 78, 79, L. ed. 1314.

When the petitioner introduced testimony of good character the court asked the Assistant District Attorney (R. p. 239): "Does the District Attorney propose to offer any testimony contrary to the defendant's testimony?" The Assistant District Attorney answered: "We have got some, but we won't use it." This statement could have been made only for improper purposes, and it is characteristic of the attitude of the District Attorney throughout the entire trial. The District Attorney, over objection of the defendant, stated his belief in the guilt of petitioner (R. p. 305); the District Attorney stated in effect to the jury that he had knowledge of facts which were not in the record, and of assuming prejudicial facts not in evidence (R. pp. 68, 76, 78, 139, 219, 145, 229). The Assistant District Attorney misquoted the testimony of witnesses to the jury. For instance, on page 145 of the Record he stated to the jury: "He said he wouldn't haul liquor in it and he would have to park the truck," a fact which the witness had refused to testify to. He continually suggested by his questions that statements had been made to him personally out of court, in respect to which no proof was of-

fered. In addition to the instance given above with reference to character testimony, the Assistant District Attorney stated (R. p. 92) that the girls (meaning Willie Mae Hobbie)) was in the liquor business and assisting in the liquor business, and testimony was introduced on the strength of this representation. This was not true, and no effort was made by the Assistant District Attorney to show that Willie Mae Hobbie had any connection with the liquor business (see her cross examination, R. pp. 256, 257, 258). He assumed a bullying attitude towards witnesses (R. pp. 107, 219, 221).

In connection with the examination of the witness Gladys Clark (R. p. 254 the Assistant District Attorney stated before the jury:

> "It would be to the defendant's interest to make all possible cases against those who were not paying off, and the more cases they made the more people they could get to pay off."

The decision of the Circuit Court of Appeals permitting such conduct to stand is directly contrary to the decision of this Court in *Williams v. United States*, 168 U. S. 382, 42 L. ed. 509. In that case, a trial for permitting immigrants to enter improperly, the District Attorney stated:

> "No doubt every Chinese woman who didn't pay Williams was sent back."

This Court said:

> "The observation made by the prosecuting attorney was, under the circumstances, highly improper. And not having been withdrawn, and the objection to it being overruled by the court, it tended to prejudice the rights of the accused to a fair and impartial trial for the particular offenses charged."

We submit that the conduct of the District Attorney in this case is squarely within the decision of this Court in *Berger v. United States*, 295 U. S. 78, 79 L. ed. 1314. Particularly, we sub-

mit, should the Court be extra careful to prevent such improper conduct by the District Attorney in a conspiracy case, for the Chief Justice of the United States and the Senior Circuit Judges, at the Judicial Conference held in 1925, recognized the difficulty of trying conspiracy cases without prejudice to an innocent defendant. The mere fact that the charge is a serious charge of conspiracy is, we submit, all the less reason for letting down constitutional bars guaranteeing an impartial trial.

II

Indictment charging conspiracy to commit numerous unrelated offenses does not sufficiently inform defendant of the charge against him, as required by the Sixth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution guarantees to any defendant the right to be informed of the specific nature of the charge against him so that he may properly prepare his defense thereto. A consideration of the varied types of conspiracies which might be proven under the present indictment is, we believe, sufficient to show that it was far from meeting this constitutional requirement. Conviction under this indictment could be sustained by proof of a conspiracy to unlawfully carry on the business of a rectifier without having paid the special tax. Or, it might be sustained by proof that the defendants, having knowledge of the actual commission of counterfeiting or any other felony cognizable by the Courts of the United States, conspired to conceal the same. Clearly an indictment which charged merely a conspiracy to commit a crime against the United States would not be sufficiently definite. Such indictment would be made no more certain by inserting each of the many criminal statutes of the United States. Yet, in effect, that is what the indictment in the instance case did. The fact that the testimony introduced was restricted to matters having to do with alcoholic beverages does not alter the fact that this indictment did not inform the defendant with any certainty whatever of the charge made against him.

The indictment is clearly defective as an indictment charging the specific offense either or misprision of felony or of extortion by an informer.

Bratton v. United States, 73 F. (2d) 795.

We recognize that in a conspiracy case the crime is a conspiracy, but this does not alter the constitutional guarantee which any defendant has of being sufficiently informed of the nature of the crime with which he is charged. The Chief Justice of the Supreme Court and the Senior Circuit Judges, in their recommendation to the District Judges at the Judicial Conference held in 1925, made this statement:

> "We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony, and we express our conviction that, both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused. Although in a particular case there may be no better concert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that use from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial basis that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further, the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant."

By the same reasoning this Court should not relax constitutional guarantees and permit a defendant to be prosecuted with a "scatter gun" indictment, an indictment purposely brought to cover such a wide field that the jury may not be able to properly weigh the testimony and will render a conviction on the

feeling that where there is so much smoke there must be some fire. As was stated by the Supreme Court of North Carolina in the leading case of *State v. Van Pelt*, 176 N. C. 633, 49 S. E. 177, 68 L. R. A. 76, 1 Ann. Cas. 495, in considering the sufficiency of a conspiracy indictment:

> "No offense is so easily charged and so difficult to be met, unless the defendants are fully informed of the facts upon which the state will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and substantial facts should be alleged. General and undefined charges of crime, especially those involving mental conditions and attitudes, should not be encouraged. They are not in harmony with the genius of a free people, living under a written Constitution. We can see no good reason why an exception to the general rules of criminal pleadings should be made in favor of this crime."

III

Not only is the defendant guaranteed by the Bill of Rights the right to be confronted with the specific charge against him, the right to an impartial trial without improper conduct by the District Attorney, but he is guaranteed the right by the Sixth Amendment to be confronted with the witnesses against him. The District Court entirely overlooked this constitutional right, apparently on the theory that since it was a conspiracy charge, any hearsay testimony as to a statement by one alleged to be a co-conspirator would be admissible, regardless of the circumstances under which or the purposes for which the statement was made. This entirely emasculated the hearsay rule and the constitutional guarantee. Over proper objection, witnesses were permitted to testify as to conferences with John D. Stewart in February of 1939, at a time when this petitioner was employed by the State Tax Commission of the State of Alabama (R. p. 61). The witness, J. C. McDuffie, was permitted to testify, over objection pointing out this specific objection, that his brother, Henry McDuffie, said he was working as a deputy sheriff. The witness, J. C. McDuffie, was permitted to testify what John

Henry McDuffie said John Arnett said (R. p. 84), although John Arnett was called as a witness for the prosecution. The witness Arnett was himself permitted to testify what John Henry McDuffie said Monroe Stewart said (R. pp. 109, 110), thus making a double hearsay. All of this testimony was from witnesses who claimed to have paid John D. Stewart for protection, but who admitted they had never had a conversation with petitioner, Monroe Stewart, in their life and had never paid Monroe Stewart a penny. The parties making these statements, hearsay evidence of which was permitted, were available to process on behalf of the United States, and no reason was given why they themselves should not be called to testify, and thus the constitutional right of the petitioner to be confronted with the witnesses against him, be protected. The decision of the Circuit Court of Appeals permitting such hearsay testimony, where the declarations were not made for the purpose of perfecting the object of the conspiracy, are, we submit, in conflict with the cases of *Whealton v. United States* (CCA 3rd), 113 F. (2d) 710, and *Kuhn v. United States* (CCA 9th), 26 F. (2d) 463 and should be corrected.

CONCLUSION

Courts to a large extent have liberalized laws of evidence in trials for conspiracy. That is particularly true in the Fifth Circuit Court of Appeals where, in the case of *Shaw v. United States*, 47 F. (2d) 26, likewise written by Judge Holmes, it is held that great latitude should be allowed to the prosecution in the admission of testimony. We submit that correspondingly greater care should be taken to assure that an innocent defendant's rights are not forfeited by reason of this liberalization, and that when liberalization is carried to the extent of evading rights guaranteed by the Constitution, supervisory action should be exercised by this Court. Petitioner had the constitutional right to be informed specifically of the charge against him. This was not done. He had the right to a fair and impartial trial and this the District Attorney denied him. He had

the constitutional right to be confronted with the witnesses against him. The prosecution was not willing to bring these witnesses on the stand and submit them to cross examination, but relied upon proof of what some other witness said he heard somebody else say they had said. For these reasons, we respectfully submit, this Court should grant certiorari and correct the errors of the courts below.

J. C. FLEMING,
JACK CRENSHAW,
Counsel for Petitioner.

I hereby certify that I have served a copy of the foregoing petition and brief on Honorable Burns Parker, District Attorney for the United States for the Middle District of Alabama.

This.....day of....., 1943.

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Of Counsel.